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No. A-464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORTH AMERICAN TELEPHONE ASSOCIATION, *Appellant*,

v.

UNITED STATES, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, BELL TELEPHONE LABORATORIES, INC., WESTERN ELECTRIC COMPANY, INC., and numerous intervenors,
Appellees.

On Appeal From The United States District Court For The District Of Columbia Circuit

JURISDICTIONAL STATEMENT

ALBERT H. KRAMER
Counsel of Record
N. FRANK WIGGINS
COHN AND MARKS
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 293-3860
Attorneys for Appellants

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED FOR REVIEW

Did the District Court correctly construe and apply the Administrative Procedures and Penalties Act in reaching the conclusion that a settlement agreement precluding Bell Operating Company participation as suppliers of unregulated CPE, although within the reaches of the public interest, ought not to be entered because the court's conception of the remedy that would maximize competitive conditions in CPE markets differed from the Department of Justice's view of the remedy that would maximize competitive conditions?

LIST OF PARTIES IN THE COURT BELOW

The following parties appeared in the court below:

Plaintiff; United States of America

Defendants; American Telephone and Telegraph Company, Bell Telephone Laboratories, Inc., Western Electric Company, Inc.

Intervenors; Ad Hoc Telecommunications Users Committee; Alabama Public Service Commission; Alarm Industries Telecommunications Committee; American Newspaper Publishers Association; American Petroleum Institute; American Satellite Company; Associated Telephone Answering Exchanges, Inc.; Association of American Railroads; Association of Data Communications Users; Association of Data Processing Service Organizations; Audichron Company; Black Citizens for a Fair Media; California Hispanics; Citizens Utilities Company; Communication Commission of the National Council of the Churches of Christ in the USA; Communications Workers of America; Compuserve, Inc.; Computer and Business Equipment Manufacturers Association; Computer and Communications Industry Association; Compuserve, Inc.; Congress Watch; Continental Telecom, Inc.; D/FW Signal, Inc.; Education and Cultivation Division of the General Board of Global Ministries of the United Methodist Church; Federal Communications Commission;[1] General Dynamics Communications Co.; General Telephone & Electronics Corp.; Independent Data Communications Manufacturers Association; In-

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[1] The Federal Communications Commission was granted intervenor status by the court. Subsequently, the agency requested that it be considered an *amicus curiae* and not an intervenor. This request was granted.

dependent Telecommunications Suppliers' Council; International Telephone and Telegraph Corp.; Jack Faucett Associates, Inc., *et al.*; Leghorn Telepublishing Co.; MCI Communications Corp.; Mobile Marine Radio, Inc.; National Association for the Advancement of Colored People; National Association for Better Broadcasting; National Association of Broadcasters; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; National Cable Television Association; National Catholic Broadcasters Association; National Citizens Committee for Broadcasting; National Latino Media Coalition; National Newspaper Association; North American Telephone Association;[2] Northeastern Telephone Co.; Office of Communication of the United Church of Christ; Reformed Church in America; Rogers Radio Communication Services, Inc.; Rural Telephone Coalition; San/Bar Corp.; Satellite Business Systems; Sonitrol Distributers Council, Inc.; Southern Pacific Communications Co.; Sperry Corporation; Stromberg-Carlson Corp.; Tandy Corporation; Telocator Network of America; U.S. Telephone Communications, Inc.; United States Independent Telephone Association; United States Telecommunications Suppliers Association; United Telecommunications, Inc.; Utilities Telecommunications Council; Warner Amex Cable Communications, Inc.; Western Union Telegraph Co.; Westinghouse Broadcasting and Cable, Inc.; States of Arizona, California, Colorado, Delaware, Illinois, Maine, Maryland, Michigan, Missouri, New Mexico, New

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[2] The North American Telephone Association is a trade association with approximately 350 members. A list of the Association's members will be made available upon request. The Association has no parent company and no subsidiary or affiliated companies.

Hampshire, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Virginia, Wisconsin; Public Service Commissions of Arkansas, California, District of Columbia, Florida, Idaho, Kentucky, Michigan, Missouri, Montana, Nebraska, Nevada, New York, South Dakota, Utah, West Virginia, Wisconsin, Wyoming; Iowa Commerce Commission; Kansas Corporation Commission; New Mexico Corporation Commission; Office of the Consumers' Counsel, State of Ohio; Oklahoma Corporation Commission; Virginia State Corporation Commission; Washington Utilities and Transportation Commission; City of Cincinnati; City of New York.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES IN THE COURT BELOW	ii
TABLE OF AUTHORITIES	vi
OPINIONS OF THE COURT BELOW	1
STATEMENT OF JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASON FOR PLENARY CONSIDERATION	10
APPENDIX	1A

TABLE OF AUTHORITIES

CASES: Page

United States v. *Agri-Mark, Inc.*, 512 F.Supp. 737 (D. Vt. 1981) 10

United States v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied sub nom. National Farmers' Organization, Inc.* v. *United States*, 429 U.S. 940 (1976) 9

United States v. *Automobile Manufacturer's Association*, 307 F.Supp. 617 (C.D. Cal. 1969), *aff'd mem. sub nom. City of New York* v. *United States*, 397 U.S. 248 (1970) 8

United States v. *Bechtel Corp.*, 648 F.2d 660 (9th Cir.), *cert. denied sub nom. Bechtel Corp.* v. *United States*, 454 U.S. 1083 (1981) 9, 10

United States v. *Carrols Development Corp.*, 454 F.Supp. 1215 (N.D.N.Y. 1978) 10

United States v. *Carter Products, Inc.*, 211 F.Supp. 144 (S.D.N.Y. 1962) 8

United States v. *Combustion Engineering, Inc.*, 364 F.Supp. 181 (D. Conn. 1972) 9

United States v. *International Telephone & Telegraph Co.*, 349 F.Supp. 22 (D. Conn. 1972), *aff'd mem. sub nom. Nader* v. *United States*, 410 U.S. 919 (1973) 8, 9

United States v. *Ling-Temco-Vought, Inc.*, 315 F.Supp. 1301 (W.D.Pa. 1970) 9

United States v. *National Broadcasting Co.*, 449 F.Supp. 1127 (C.D. Cal. 1978) 9

STATUTES:

15 U.S.C. § 2 (1976) 2

15 U.S.C. § 16 (1976) ..... 2, *passim*

15 U.S.C. § 29(b)(1976) 3

OTHER:

H. Rep. No. 528, 93d Cong., 1st Sess. (1973) 9

S. Rep. No. 298, *Antitrust Law Amendments*, 93d Cong., 1st Sess. (1973) 9

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JURISDICTIONAL STATEMENT

OPINIONS OF THE COURT BELOW

The opinions of the United States District Court for the District of Columbia Circuit of August 11, 1982, (declining to enter proposed order) (J.A. 1[3]), August 23, 1982 (denying reconsideration of certain aspects of the August 11, 1982 opinion) (J.A. 195), August 24, 1982 (modifying final judgment) (J.A. 173) and November 10, 1982 (certifying appeal) (J.A. 204) have not been reported.

[3] "J. A." citations refer to pages of the Joint Appendix to Jurisdictional Statement of Appellants.

STATEMENT OF JURISDICTION

The District Court proceedings in C.A. No. 74-1698 were initiated in 1974 with a civil complaint filed by the United States charging violations of section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), by American Telephone and Telegraph Company, Western Electric Company and Bell Telephone Laboratories, Inc. (collectively, "AT&T"). An earlier government antitrust prosecution of American Telephone and Telegraph Company and Western Electric Company in the United States District Court for the District of New Jersey had been resolved in 1956 by the entry of a consent order. In January of 1982, the principal parties to the 1956 order filed papers seeking a modification of the 1956 consent order and requested that the proceeding be transferred to the United States District Court for the District of Columbia. The 1956 case was transferred and consolidated with the 1974 case; AT&T and the Department of Justice sought dismissal of the 1974 prosecution. The parties stipulated, with the agreement of the court, that the mechanisms of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (1976), should apply to consideration of the judicial actions requested. On August 11, 1982, Judge Greene, before whom these requests lay, declined to enter the orders agreed to by the parties but indicated that, if certain modifications were made in the agreement negotiated by the United States and AT&T, he would accede to the settlement arrangements. (J.A. 1, 106-9, 170.) The alterations proposed by Judge Greene were effected and, on August 24, 1982, the court entered a stipulation for the voluntary dismissal of the 1974 case and a modification of the 1956 consent decree. (J.A. 173.) An order granting the status of intervenor to, *inter alia*, the North American Telephone Association was filed on August 26, 1982. (J.A. 191, 193.) The North American Telephone Associa-

tion filed a notice of appeal in the United States District Court for the District of Columbia on October 25, 1982. (J.A. 222.) In response to motions by the United States and three intervenors, the District Court, on November 10, 1982, certified all pending appeals to this Court pursuant to 15 U.S.C. § 29(b) (1976). (J.A. 204.)

STATUTES INVOLVED[4]

15 U.S.C. § 2

15 U.S.C. § 16

15 U.S.C. § 29

STATEMENT OF THE CASE

The persuasion that AT&T had employed its preeminent position in the telecommunications business to work violations of the antitrust laws has resulted in two government actions against that firm in the past twenty-five years. Both of those proceedings are merged in this case.

The litigation begun by the government in 1949 was concluded through the entry of a consent judgment in 1956. A primary focus of that lawsuit was the government's conviction that AT&T had unlawfully carved out a monopoly for the products manufactured by Western Electric Company, one of the constituent entities of the Bell System, including the telephone terminal equipment

[4] The text of these provisions is set out at J.A. 242-47.

devices that have come to be called "customer premises equipment" or "CPE".[5]

The 1956 settlement negotiated between the Department of Justice and AT&T did not seek to remove AT&T from its monopoly position in CPE markets. Instead, the 1956 settlement limited AT&T's business undertakings to areas "subject to public regulation" on the theory that such regulation would, among other things, effectively contain the companies' power to extract monopoly profits from CPE consumers. By 1974 it had become apparent to the government that this protection was no longer sufficient. In the years between entry of the 1956 consent decree and initiation of the 1974 litigation the contours of CPE markets had changed dramatically. Tariffs prohibiting the interconnection to local telephone exhanges of CPE other than that manufactured or approved by AT&T were eliminated by actions of the Federal Communications Commission, opening CPE markets to competing manufacturers and suppliers. Indeed, the purpose of the F.C.C.'s actions had been to open these markets to competition.

The 1974 litigation proceeded on the theory that AT&T had violated the antitrust laws in its efforts to stifle the development of this competition in CPE markets. By application of its monopoly power in providing basic telephone exchange transmission service, exercised through

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[5] The North American Telephone Association ("NATA") is a trade association representing the interests of firms that compete with AT&T in the manufacturing and supplying of CPE. Although the District Court litigation involved other issues, NATA's interest and the focus of this submission are limited to the court's actions concerning CPE.

the 22 Bell Operating Companies ("BOCs"), AT&T was able to engage in discriminatory and exclusionary conduct as well as subsidize its own CPE offerings so as to exclude entirely or limit the markets of its CPE competitors. The 1956 consent decree was insufficient to curb those practices. The government and AT&T agreed to settle the 1974 case through a modification of the 1956 consent decree. The proposed settlement would have divested AT&T from ownership of the BOCs in order to separate AT&T's competitive CPE activities from its control over the monopoly "bottleneck" of the local telephone transmission service companies. This would, by the government's assessment, limit AT&T's ability to continue to commit anticompetitive practices in the CPE markets. The proposed agreement would also have prohibited the divested BOCs from providing CPE. The government theorized that if AT&T had been able to use the monopoly resources of the local telephone companies to curtail CPE competition, the divested BOCs could continue to do the same; only by insisting that the monopoly exchange firms be barred from competitive CPE markets could this potential for mischief be averted.

Following publicaton of the settlement proposal and the submission of a considerable volume of public comment on it, the agreement was put before the trial court for evaluation under the standards of the Antitrust Procedures and Penalties Act. Judge Greene found that the public interest would be advanced—the operative standard in the statute—by the proposed divestiture provisions. He was not convinced, however, that the divested BOCs should be barred from future participation in the marketing[6] of CPE. Judge Greene concluded that the

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[6]Judge Green agreed that the divested companies ought not to be permitted to manufacture CPE.

state of competition in CPE markets would be improved if the divested BOCs were eligible to compete with AT&T and others in the supply of CPE.

The difference between Judge Greene and the government involves variant predictions of the future conduct of the divested BOCs, their relation to CPE markets, and the nature of those markets. The government, having seen these companies and their local service monopolies used as instruments in the suppression of competition in CPE markets, feared a recurrence of anticompetitive conduct and secured a settlement agreement that would have barred the possibility of future abuses. The theory of the case advanced by the Department of Justice emphasized the risk that the Bell Operating Companies might subvert competition in CPE markets through anticompetitive practices carried out on the strength of the local exchange monopolies of these companies. The relief structured through the settlement negotiated by the government was responsive to this thesis. In the government's view, the removal of the Bell Operating Companies from CPE markets would prove a spur to the growth of competition.[7]

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[7] The government explained these arguments in considerable detail in pleadings filed throughout the course of the settlement agreement proceedings conducted by the District Court. The government's position is summarized in a pleading objecting to Judge Greene's August 11, 1982 determination that the BOCs ought not to be excluded from CPE markets. The text of that submission is set forth in the Appendix to this Jurisdictional Statement. Although the Department of Justice did finally agree to settle its litigation on the terms dictated by Judge Greene, its continued dedication to the originally proposed settlement terms is reflected in a memorandum filed by the government with the revised decree. The text of that memorandum is set out in the Appendix at 11a.

Judge Greene approached the issue of relief very differently. Judge Greene felt that the likelihood of future anticompetitive acts by the BOCs was remote. The judge concluded that the goals of the antitrust laws would be better served by permitting the divested companies to engage in the marketing of CPE as, essentially, new competitors with AT&T. Instead of addressing the structure of the CPE markets with an eye to their future development, Judge Greene emphasized the immediate boost to competition that would be worked by BOC participation in the supply of CPE. In short, the District Court opted for its own view that an immediate increase in the number of CPE market competitors was superior to the structural protections against future anticompetitive activities endorsed by the government.

NATA believes that Judge Greene was wrong in refusing to approve the proposed settlement. The settlement provision precluding BOC involvment in CPE markets is in the "public interest" as that term is used in the Antitrust Procedures and Penalties Act. The bar against CPE activities by the divested BOCs provides an important protection against future antitrust violations. Judge Greene gave too little weight to the importance of such safeguards. He assigned too much credit to the short run value of offsetting AT&T's dominant position in CPE markets with the countervailing competitive strength of the BOCs as a supplement to existing competition in those markets.

Even were one to conclude that Judge Greene's predictive assessment of the future posture of the BOCs in CPE markets is more likely to be correct than the view of the Department of Justice, it was error for the District Court to elevate its views over those of the government. The factors to be considered by the court in determining whether to approve a proposed settlement were set forth

in *United States* v. *Automobile Manufacturer's Association*, 307 F.Supp. 617 (C.D. Cal. 1969), *aff'd mem. sub nom. City of New York* v. *United States*, 397 U.S. 248 (1970):

> This Court does have the power to disapprove the proposed settlement, but its use requires the exercise of discretion based upon legal, as distinguished from administrative, considerations. For instance, the Court should withhold its approval if the decree be unenforceable or if it should provide for relief not consistent with the prayer of the complaint. The Court may properly consider whether or not the rights of persons not parties to the action are jeopardized and whether the consent decree, on the whole, is against the public interest.

307 F.Supp. at 621.[8]

The District Court found that the proposed settlement was within the reaches of the public interest. (J.A. 32-33) Judge Greene also concluded that the negotiated agreement did not jeopardize the rights of any third parties. The court did, however, differ with the Department of Justice over what constituted the most effective available remedy, even though courts have traditionally accorded great deference to the Department of Justice, particularly insofar as the Department has determined that the relief set forth in the decree is reasonably calculated to remedy the harmful effects of the behavior set forth in the

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[8] *See also United States* v. *International Telephone & Telegraph Co.*, 349 F.Supp. 22 (D.Conn. 1972), *aff'd mem. sub nom. Nader* v. *United States*, 410 U.S. 919 (1973); *United States* v. *Carter Products, Inc.*, 211 F.Supp. 144, 148 (S.D.N.Y. 1962) ("if a consent decree will afford substantially the same relief that could be obtained after a hearing upon the merits, such consent procedure should be adopted.")

complaint. *United States* v. *Ling-Temco-Vought, Inc.*, 315 F.Supp. 1301 (W.D.Pa. 1970).[9]

This remains the law under the Antitrust Procedures and Penalties Act. That legislation was designed to modify the procedures by which consent decrees are entered. The Senate Report stated:

> By definition, antitrust violators wield great influence and economic power. They can often bring significant pressure to bear on government . . . in connection with handling of consent decrees. S.782 recognizes that in some instances, there may be a need for additional participation by interested parties in the approval of consent decrees.

S.Rep. No. 298, *Antitrust Law Amendments*, 93d Cong., 1st Sess. 5 (1973). The House Report made clear that the legislation, although reforming procedures, was not intended to disturb existing "case law" as to the standards for approval of consent decrees. H.Rep. No. 528, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 6535, 6539.

Subsequent cases have confirmed that the Antitrust Procedures and Penalties Act did not alter pre-existing standards governing the propriety of antitrust consent decrees. *See United States* v. *National Broadcasting Co.*, 449 F.Supp. 1127, 1141-42 (C.D. Cal. 1978); *United States* v. *Associated Milk Producers, Inc.*, 394 F.Supp. at 44-45. *Cf. also United States* v. *Bechtel Corp.*, 648 F.2d

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[9] *See also United States* v. *International Telephone & Telegraph Corporation*, 349 F.Supp. at 25-26, *United States* v. *Combustion Engineering, Inc.*, 364 F.Supp. 181, 183-84 (D.Conn. 1972); *United States* v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29, 41-42 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied sub nom. National Farmers' Organization, Inc.* v. *United States*, 429 U.S. 940 (1976).

660 (9th Cir.), *cert. denied sub nom. Bechtel Corp.* v. *United States*, 454 U.S. 1083 (1981); *United States* v. *Agri-Mark, Inc.*, 512 F.Supp. 737 (D. Vt. 1981); *United States* v. *Carrols Development Corp.*, 454 F.Supp. 1215 (N.D.N.Y. 1978). As the court stated in the *Bechtel* case:

> We cannot agree that a district court should engage in an unrestricted evaluation of what relief would best serve the public. The balancing of competing social and political interests affected by a proposed decree must be left, in the first instance, to the discretion of the Attorney General. . . . The court is not required to determine whether a particular decree is the one that will best serve society . . .

United States v. *Bechtel Corp.*, 648 F.2d at 666.

In short, the Antitrust Procedures and Penalties Act does not accord to the judiciary either the duty or the privilege of supplanting the reasonable judgments of the Department of Justice. When the government's determination of appropriate terms for the settlement of antitrust litigation is neither tainted by improper influence nor flawed with false logic, a judge's conviction that there exists a superior plan for settlement must give way to the government's preference.

REASONS FOR PLENARY CONSIDERATION

The terms of the modification of final judgment entered by the District Court will take effect on or before February 24, 1984. A final determination by this Court of the lawfulness of the District Court action in advance of that date is imperative. Although the issue raised by this appeal is not unduly complex, we believe that its resolu-

tion is sufficiently important to warrant full briefing and consideration.

Respectfully submitted,

ALBERT H. KRAMER
Counsel of Record

N. FRANK WIGGINS
COHN AND MARKS
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 293-3860
Attorneys for
Appellants